SCOTT & ENGLISH (M) SDN. BHD.

v.

YEK TOH MING

HIGH COURT BORNEO, SIBU
CHONG SIEW FAI J
[ORIGINATING MOTION NO. KG 9 OF 1983]
24 SEPTEMBER 1984

ADMINISTRATIVE LAW: *Application for orders of certiorari and mandamus - Applicant's Counsel rejected by President of Sessions Court - Effect.*

The application was for an order of *certiorari* to quash the order made by the President of the Sessions Court, Sibu, on 29 July 1983, dismissing an action of the applicant (plaintiff) against the respondent (defendant), and for an order of *mandamus* directing the President to hear and determine the action according to law. The plaintiff's action was dismissed by the President on the ground that "The plaintiff his advocate did not appear". In his record of the proceedings the President also stated that there was no such advocate as a "stand-in advocate" and that the so called "stand-in advocate" who had not been briefed or instructed had no *locus standi.* The applicant however contended that one David Teng Lung Chi, an advocate, had been instructed to appear and had in fact appeared in Court as instructed. The note of proceedings did not show that David Teng was in Court.

Held:

[1] In the absence of evidence or statement to the contrary, it must be accepted that David Teng was before the President in the Sessions Court, Sibu, at the material time on the date in question.

[2] The finding of the President that David Teng was a "stand-in advocate" was not justified. The finding was, on record, unsupported by any evidence or statement made in Court. To come to a conclusion where there is no evidence or material to support is to make an error in law. *(Bean v. Doncaster Amalgamated Collieries* [1944] 2 All ER 279 @ 284; *R. v. Birmingham Compensation Appeal Tribunal* [1952] 2 All ER 100).

[3] Neither was the finding that David Teng had not been briefed or instructed justified. In the absence of any material in the notes to the proceedings and of any evidence to the contrary, David Teng's statement in his affidavit must be accepted. When Counsel appears in Court and states that he is instructed, the Court cannot enquire into his authority to appear.

[Motion allowed. Order of learned President quashed. Said action be remitted to said Sessions Court.]

Cases referred to:
Bean v. Doncaster Amalgamated Collieries [1944] 2 All ER 279
R. v. Birmingham Compensation Appeal Tribunal [1952] 2 All ER 100

Legislation referred to:
Rules of the High Court 1980, O. 53 r. 5(1).

Other source referred to:
Halsbury's Laws of England, 4th Edn. Vol. 3 para. 1179

For the applicant (ex parte) - T.O. Thomas

JUDGMENT

Chong Siew Fai J:

This is a motion taken out pursuant to leave of this Court granted on 13 October 1983 for an Order of *certiorari* to quash the order made by the learned President of the Sessions Court, Sibu on 29 July 1983 dismissing the action (Summons No. SB/21/83) between the applicant (plaintiff) and one Yek Toh Ming (defendant), and for an order of *mandamus* directing the learned President aforesaid to hear and determine the said action according to law.

Copies of the motion and of the statement and affidavit referred to therein had been served on the Registrar of the Sessions Court, Sibu and on the said Yek Toh Ming as shown in the affidavits of Gerald Chee Teck Hock affirmed on 19 January 1984 and 9 February, 1984 respectively. A true copy of the order complained of verified by affidavit had also been served on the Attorney-General, Malaysia, pursuant to O. 53 r. 5(1).

The background leading to the making of the order complained of may be briefly outlined as follows. The applicant brought the action against the said Yek Toh Ming. The action was dismissed by the learned President on 29 July 1983. The proceedings in Court recorded by the learned President as shown in Exhibit "R" annexed to the statement made on application for leave to issue this motion reads:

> "29 July 1983"
>
> The plaintiff his advocate did not appear.
>
> Action dismissed.
>
> There is no such advocate known as a "stand-in advocate" and he is not an *amicus curiae*. The so-called "stand-in advocate" who has not been briefed or instructed is not the advocate or solicitor on record and thus no *locus standi* in this proceeding.
>
> (Sgd.) Y.C. Chiu
>
> 29 July 1983

The grounds upon which the present relief is sought are as follows:

> (1) The order of the learned President was wrong in law on the face of the record, copy of which is annexed hereto marked "R".
>
> **Alternatively**
>
> The learned President erred in law in holding that the "plaintiff, his advocate did not appear", as indeed, David L.C. Teng Esquire, an advocate of the Honourable Court did appear and did announce that he had been duly instructed to appear as Counsel for the plaintiff.
>
> (2) The learned President erred in law in failing to accept the announcement for David Teng Esquire, that he had been instructed to appear as Counsel for the plaintiff.

In the affidavit of David Teng Lung Chi, an advocate, made on 22 August 1983, he said he was instructed by M/s Thomas & Co. advocates for the plaintiff to appear as Counsel at the hearing of the case (Summons No. SB/21/83) on 29 July 1983 and that he appeared as instructed. The note of proceedings does not show Mr. David Teng was in Court. However, having regard to the affidavit evidence of Mr. Teng and in the absence of evidence or statement to the contrary, I am prepared to accept that he was present before the learned President in the Sessions Court, Sibu, at the material time on the date in question.

In his affidavit Mr. David Teng also said that when the case was called he informed the Court that he was appearing for the plaintiff (the applicant in this motion) having been instructed by the advocates on record, namely, M/s Thomas & Co. of Kuching. He denied having stated to the Court that he was "standing in for Mr. T.O. Thomas". To strengthen his point, the contents of a letter 25 July 1983 from M/s Thomas & Co. to M/s David Teng & Co. was reproduced in which M/s Thomas & Co. stated that they had not asked Mr. David Teng to "stand in" as they did not understand the expression and confirmed that they have instructed Mr. Teng to appear as Counsel for the plaintiff.

The date of the said letter (25 July 1983) is 4 days before the return day of the said Summons No. SB/21/83. There is no evidence as to when the said letter was received and read by Mr. Teng. In any event, so far as concerning the motion, the said letter, in my view, merely notified M/s David Teng & Co. what the writer thought of the words "stand in" and confirmed the instructions of the appearance of Counsel in Court. Assuming that the letter arrived in time and was read by Mr. Teng prior to the Court hearing on 29 July 1983, it did no more than indicating a higher probability that in the light of the contents of the letter, Mr. Teng would not have used the words "stand in" or the like. In my opinion, the point that really matters is what Mr. Teng had exactly stated in Court. In his short judgment the learned trial President said that: "The so-called 'stand in advocate' who has not been briefed or instructed is not the advocate or solicitor on record and thus has no *locus standi* in this proceeding." I would consider this remark in two aspects. Firstly, regarding the words 'stand in advocate' referred to by the learned trial President, nowhere in his note does it show that that was what in fact was said and who said it and least of all, that Mr. Teng said it. Neither is there any evidence or material in the note of proceedings to justify the finding or statement that advocate "has not been ... instructed". In other words, the remarks or findings of the learned trial President are, on record, unsupported by any evidence or statement made in Court. To come to a conclusion where there is no evidence or material to support is to make an error in law. *Bean v. Doncaster Amalgamated Collieries* [1944] 2 All ER 279; *R. V. Birmingham Compensation Appeal Tribunal* [1952] 2 All ER 100.

In his affidavit made on 22 August 1983, Mr. Teng said that he informed the Court that he was appearing for the plaintiff having been instructed by M/s Thomas & Co. of Kuching and he denied having told the Court that he 'stood in' for Mr. T.O. Thomas. On the other hand, the note of proceedings does not record what Mr. Teng had said in Court. Nor is there anything contradicting what he had deposed. However, in view of what I have stated in the paragraph immediately preceding i.e. no material in support of the learned President's remark or finding, it is unnecessary to dwell on what Mr. Teng exactly said in Court.

Secondly, I would deal with the remark or finding of the learned trial President that "the so-called 'stand-in advocate' **who has not been briefed or instructed...".** Here again there is no evidence or statement to support it. On the other hand, in his affidavit Mr. Teng said he had been instructed by M/s Thomas & Co. to appear as counsel and that he appeared in the Sessions Court at Sibu at the time and on the day in question and informed the Court that he was appearing for the plaintiff having been instructed by the advocates on record namely M/s Thomas & Co. of Kuching. In the absence of any material in the notes of proceedings and in the absence of any evidence to the contrary, I am inclined to accept what Mr. Teng stated in his affidavit. In *Halsbury's Laws of England* Edn. 4 Vol. 3 para. 1179, the following passage appears: "When counsel appears in Court and states that he is instructed, the Court will not inquire into his authority to appear." In any event, if the learned President had any doubt as to the authority or instructions of Mr. Teng to appear, he should

have taken such action as inquiring into the matter of suspending the proceedings until he was satisfied of the position of Mr. Teng. If such a course was taken, the position or authority of Mr. Teng would have been clear.

For the above reasons, the motion is allowed. There shall be an order that the order of the learned President made on 29 July 1983 whereby the action Summons No. SB/21/83 was dismissed be removed into this Court and thereupon be quashed. I further order that the said action be remitted to the said Sessions Court for it to be dealt in accordance with law.

Also found at [1985] 1 CLJ 482